APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

G020323
(Super. Ct. No. 734096)

TEXTRON FINANCIAL CORPORATION,
Plaintiff and Appellant,

v.

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PENNSYLVANIA ET AL.,
Defendants and Appellants.

Filed: January 29, 2001

OPINION

Appeals from a judgment and post-judgment orders of the Superior Court of California, County of Orange, Nancy Wieben Stock and Raymond J. Ikola, Judges. Motion to

Augment the record on appeal. Judgment and post-judgment orders affirmed. Motion granted.

Albert Weiland & Golden and Marcus M. Kaufman; Stephan, Oringher, Richman & Theodora and Robert M. Dato for Plaintiff and Appellant.

Horvitz & Levy, Mitchell C. Tilner and Peter Abrahams; Lewis, D'Amato, Brisbois & Bisgaard, R. Gaylord Smith and Michael W. Connally for Defendants and Appellants.

* * *

Plaintiff Textron Financial Corporation sued defendant National Union Fire Insurance Company of Pittsburgh, Pennsylvania (National Union) and others over a refusal to honor a claim for insurance benefits concerning property damage to a commercial bus in which it held a security interest. Plaintiff settled with two parties and proceeded to trial against National Union and American International Adjustment Company, Inc. (AIAC), National Union's claims adjuster. After a lengthy trial divided into three phases, the trial court entered judgment on a jury's special verdict awarding plaintiff $165,414.40 in compensatory damages and $10 million in punitive damages against National Union. The court entered judgment, including costs, for AIAC against plaintiff.

Both plaintiff and National Union filed post-judgment motions. The trial court denied National Union's motion for judgment notwithstanding the verdict and plaintiff's motion for new trial, but conditionally granted National Union a new trial unless plaintiff agreed to reduce the punitive damage award to $1.7 million. Plaintiff agreed to the remittitur. The court also struck plaintiff's request for expert witness fees.

National Union appeals from the judgment and the denial of its motion for judgment notwithstanding the verdict, challenging both the punitive damage award on several grounds, and the trial court's refusal to offset the amounts plaintiff received in the pre-trial settlements. Plaintiff

appeals, challenging the trial court's striking of its cause of action for unfair business practices, the judgment in favor of AIAC, including costs, the remittitur of punitive damages, and the denial of its request for expert witness fees.

FACTS

Il Sung Ko operated a tour bus company, Taeguk Tour and Sightseeing (Taeguk). Plaintiff loaned Ko funds to purchase a bus, receiving in return a security interest in the vehicle. The security agreement required Ko to insure the bus. Ko obtained a National Union liability insurance policy through D. W. Ferguson & Associates, Inc. (Ferguson), an independent insurance brokerage. The policy was issued through TRM International, Inc. (TRM), a company appointed by National Union to solicit, bind, write, and administer policies for its commercial bus program. The policy listed plaintiff as a loss payee and required National Union to mail plaintiff notice in advance if it cancelled the policy.

Taeguk suffered a downturn in business and Ko failed to timely pay his insurance premiums. In October 1992, TRM sent Ko notice it intended to cancel the policy. TRM did not send a copy of the cancellation notice to plaintiff. The policy terminated November 27.

Beginning in late October and throughout November, Ferguson and Taeguk discussed reducing the insurance premiums by deleting coverage for some of Ko's vehicles. Ferguson also corresponded with a TRM underwriter about the situation, proposing the issuance of a new policy covering only some of Ko's busses. The underwriter suggested an alternative whereby TRM would reinstate the original policy and give Ko a credit against his policy's premium if he agreed to certain conditions, which included delivering the license plates of two buses to Ferguson and temporarily suspending use of those vehicles. Plaintiff presented expert testimony that, unlike a transaction where a vehicle is deleted from a policy, the alternative approach implemented a

procedure described as lay-up credit. Under a lay-up credit, the insured maintains coverage on a vehicle while it is not being operated.

Ko agreed to this proposal, and on December 1, TRM reinstated the policy effective as of November 27. The bus encumbered by plaintiff's security interest was one of the vehicles Ko intended not to use. Plaintiff did not receive notice of the policy reinstatement with the endorsement which reflected Ko's business received a premium credit due to the vehicle's non-use. National Union claimed it sent a copy of this endorsement to plaintiff, but plaintiff denied receiving it.

In January 1993, the bus encumbered by plaintiff's lien suffered extensive damage when it collided with another vehicle on a public highway. At Taeguk's request, Ferguson submitted a notice of claim to AIAC. On February 4, TRM sent AIAC a notice verifying coverage for the vehicle and confirming plaintiff as a loss payee. However, after further correspondence with Taeguk and TRM, AIAC denied the claim, asserting the bus had been deleted from the policy before the accident. TRM prepared an endorsement deleting the bus from the policy (Number 8) on February 16. This endorsement purported to be effective as of December 1, 1992.

In late 1993, Ko defaulted on plaintiff's loan. Plaintiff then learned about the accident and contacted Ferguson concerning insurance benefits to repair the vehicle. Ferguson informed plaintiff the bus had been removed from the policy before the accident. Plaintiff sued Ko, recovering a judgment against him and incurring $3,859.50 in legal fees in the process. However, Ko filed bankruptcy and discharged the debt.

Plaintiff submitted a claim to National Union for benefits under the insurance policy. At that time, it possessed only a certificate of insurance, not a copy of the policy.

AIAC also handled plaintiff's claim. TRM informed AIAC the encumbered bus had been deleted from the policy before the accident and sent it a copy of endorsement number 8. A certificate of mailing on that copy covered the part of the endorsement reflecting the date TRM had prepared it. After an AIAC claims manager discussed the matter with John Lavin, a senior underwriter with the division handling National Union's bus program, and Tom Spangenberg, TRM's president, AIAC advised plaintiff the claim was being denied. The basis of the denial was that Ko deleted the bus from the policy before the accident, and TRM and AIAC concluded National Union's policy did not obligate it to give plaintiff advance notice of the deletion. National Union did not send plaintiff a copy of the policy until August 1994. Again, the portion of endorsement Number 8 displaying the date on which it had been prepared was covered by the mailing certificate.

PROCEDURAL BACKGROUND

The trial's first phase dealt with plaintiff's breach of contract claim against National Union. The court found, as a matter of law, the insurance contract's loss-payable clause constituted a separate agreement between plaintiff and National Union, obligating National Union to provide 30 days' notice of the policy's cancellation or the bus's deletion from it, and that National Union failed to comply with this requirement. The jury subsequently returned a special verdict awarding plaintiff $61,513.80 under the policy.

The second phase involved plaintiff's causes of action for bad faith against National Union and fraud against both National Union and AIAC. The jury returned a special verdict finding National Union violated the policy's implied covenant of good faith and fair dealing and that it acted with oppression, malice, and fraud in doing so. The jury also returned a special verdict, finding National Union liable for intentional misrepresentation and concealment, and awarded plaintiff $3,859.80 in damages. Based on its interpretation

of the jury's answers in the special verdict, the trial court entered judgment for AIAC on the fraud count.

During this phase, the trial court also ruled plaintiff could recover $30,268.16 in attorney fees as damages under *Brandt* v. *Superior Court* (1985) 37 Cal.3d 813. The parties stipulated plaintiff was entitled to $55,616.34 in costs pursuant to *Brandt*. Subsequently, the court denied National Union's request to offset the pretrial settlements plaintiff received from Ferguson ($26,500) and TRM ($62,500) against the compensatory award imposed on it.

The trial's third phase dealt with punitive damages. The jury returned a special verdict assessing $10 million in punitive damages against National Union which the trial court subsequently reduced to $1.7 million. In addition, the judgment awarded plaintiff compensatory damages, consisting of the policy benefits plus interest, the legal expenses recoverable under *Brandt* v. *Superior Court*, supra, 37 Cal.3d 813, and the damages for fraud. Finally, the court awarded AIAC $10,277.52 in costs against plaintiff.

DISCUSSION

PLAINTIFF'S APPEAL

Demurrer to the Unfair Business Practices Cause of Action

The complaint's fourth count sought injunctive and restitutionary relief under Business and Professions Code section 17200 et seq. against National Union and AIAC for "engag[ing] in unfair competition" in "handling [of plaintiff's] claim, and the claims of other persons." Plaintiff alleged National Union, "aided and abetted" by AIAC, "used misleading documents to falsely suggest that it would provide insurance . . . where it had no intention to do so," and "falsely suggested that it would . . . provid[e] timely notice of [policy] cancellations," "misrepresented the terms and meaning of its policies . . . to provide a pretext for its refusal to provide timely notice," and "engaged in a pattern and

practice of wrongful and false cancellations of insurance policies . . . ."

Relying on *Moradi-Shalal* v. *Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, National Union and AIAC generally demurred to this count. The trial court sustained the demurrers without leave to amend. Citing *State Farm Fire & Casualty Co.* v. *Superior Court* (1996) 45 Cal.App.4th 1093, plaintiff contends the trial court's ruling was erroneous.

Moradi-Shalal held the Unfair Insurance Practices Act (Ins. Code, § 790 et seq.; UIPA) does not create a private cause of action against insurers who violate its provisions. (*Moradi-Shalal* v. *Fireman's Fund Ins. Companies*, *supra*, 46 Cal.3d at pp. 304-305.) This rule applies to both first party and third party claims. (*Maler* v. *Superior Court* (1990) 220 Cal.App.3d 1592, 1597-1598; *Zephyr Park* v. *Superior Court* (1989) 213 Cal.App.3d 833, 836-838.) While insurance companies are subject to California laws generally applicable to other businesses, including laws governing unfair business practices (Ins. Code, § 1861.03, subd. (a)), parties cannot plead around *Moradi-Shalal's* holding by merely relabeling their cause of action as one for unfair competition. (*Manufacturers Life Ins. Co.* v. *Superior Court* (1995) 10 Cal.4th 257, 283-284; *Maler* v. *Superior Court*, *supra*, 220 Cal.App.3d at p. 1598; *Safeco Ins. Co.* v. *Superior Court* (1990) 216 Cal.App.3d 1491, 1494.)

The specific allegations of wrongful conduct contained in plaintiff's fourth cause of action, using misleading documents and misrepresenting both the terms of the insurance policies and its obligations under them for its own benefit, are the type of activities covered by the UIPA. (Ins. Code, § 790.03, subds. (a) & (h).) In *Safeco Ins. Co.* v. *Superior Court*, *supra*, 216 Cal.App.3d 1491, the court ordered dismissal of an action which included a request for injunctive relief under Business and Professions Code section 17200 et seq. based on an insurer's allegedly unfair claims settlement practices. (*Id.* at pp. 1493-1494.) "Though the

issue is one of first impression, we have no difficulty in deciding the Business and Professions Code provides no toehold for scaling the barrier of *Moradi-Shalal*. . . . To permit plaintiff to maintain this action would render *Moradi-Shalal* meaningless." (*Id.* at p. 1494.) Under the foregoing cases, merely alleging these purported acts constitute unfair business practices under the unfair competition law is insufficient to overcome *Moradi-Shalal*.

In a few cases, the Supreme Court has allowed an action against an insurance company under the unfair competition law where the alleged conduct constituted an unlawful restraint on trade under the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.), even though it also violated the UIPA. (*Quelimane Co.* v. *Stewart Title Guarantee Co.* (1998) 19 Cal.4th 26, 43-44; *Manufacturers Life Ins. Co.* v. *Superior Court*, *supra*, 10 Cal.4th at pp. 283-284.) "This conclusion does not compromise the rule of *Moradi-Shalal* in any way. The court concluded there that the Legislature did not intend to create new causes of action when it described unlawful insurance business practices in section 790.03, and therefore that section did not create a private cause of action under the UIPA. The court did not hold that by identifying practices that are unlawful in the insurance industry, practices that violate the Cartwright Act, the Legislature intended to bar Cartwright Act causes of action based on those practices." (*Manufacturers Life Ins. Co.* v. *Superior Court*, *supra*, 10 Cal.4th at p. 284.)

The case on which plaintiff relies, *State Farm Fire & Casualty Co.* v. *Superior Court*, *supra*, 45 Cal.App.4th 1093, held the plaintiff-insureds had sufficiently alleged a cause of action against their insurer under the unfair competition law based on allegations of conduct constituting common law fraud and breach of the implied covenant of good faith and fair dealing, even though the same conduct violated the UIPA. "While *Moradi-Shalal* clearly held that the Legislature did not intend to create new causes of action when it enacted section 790.03, it is also clear that the Legislature did not intend in any way to circumscribe the

previously existing common law right of an insured to seek redress for an insurer's fraudulent deception or breach of the covenant of good faith implied in the policy. . . . Thus, . . . common law claims remain as a firm legal basis on which an insured may rely to seek redress against an insurer." (*Id.* at pp. 1107-1108.)

The persuasiveness of *State Farm* has been undercut by the Supreme Court's subsequent disapproval of its definition of "unfair" business practices. Quoting from *People* v. *Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, *State Farm* declared: "The test of whether a business practice is unfair 'involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim . . . . [Citations.]' . . . . [A]n 'unfair' business practice occurs when that practice 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' [Citation.]" (*State Farm Fire & Casualty Co.* v. *Superior Court, supra*, 45 Cal.App.4th at pp. 1103-1104, fn. omitted.)

In *Cel-Tech Communications, Inc.* v. *Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, the Supreme Court found this definition "too amorphous and provid[ing] too little guidance to courts and businesses." (*Id.* at pp. 184-185.) While *Cel-Tech Communications* limited its discussion to the context of an action between competitors, the court concluded, "any finding of unfairness to competitors under section 17200 be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition," and that under Business and Professions Code section 17200, "the word 'unfair' . . . means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law . . . ." (*Id.* at pp. 186-187, fn. omitted. See *Schnall* v. *Hertz Corp.* (2000) 78 Cal.App.4th 1144,1165-1167 [applying *Cel-Tech*

Communications, Inc.'s standard in vehicle lessee's action against rental agency for allegedly concealing or obscuring the rental agreement's fuel service charge].)

Harmonizing *Moradi-Shalal*'s holding with the foregoing decisions supports a conclusion the trial court properly sustained the demurrers to plaintiff's unfair competition claim. First, the holding in *Safeco Ins. Co.* v. *Superior Court*, *supra*, 216 Cal.App.3d 1491 supports this result. Second, this case is distinguishable from *Quelimane* and *Manufacturers Life* in two respects. Neither decision involved an action by an insured or a third party based on the insurer's alleged failure to comply with a policy or to provide benefits. In *Quelimane*, parties who acquired real estate at tax sales sued title insurance companies for refusing to issue policies on their property. *Manufacturers Life* concerned an insurance agency's action against insurance companies for boycotting the agency. Also, in both cases the plaintiff alleged a Cartwright Act violation as the basis for its unfair competition cause of action. Finally, given the Supreme Court's disapproval of *State Farm*'s "amorphous" definition of "unfair" practices and its focus on legislatively declared public policy, reliance on general common law principles to support a cause of action for unfair competition is unavailing.

Under these circumstances, the trial court properly found plaintiff failed to state a cause of action against National Union and AIAC for unfair business practices.

The Jury's Phase Two Findings

During the second phase, the jury returned a special verdict containing findings on the elements of two theories of deceit, intentional misrepresentation and concealment of a material fact. The jury's responses reflect it found both National Union and AIAC made representations of a material fact on which plaintiff justifiably relied to its injury, and that both defendants made the representations "recklessly without knowing whether [they were] true or false." However, the jury concluded AIAC did not know the representations were

false, and did not make them with the intent to defraud plaintiff. On the concealment theory, the jury found both defendants concealed or suppressed a material fact which resulted in injury to plaintiff, but also found AIAC did not intentionally conceal or suppress a material fact with the intent to defraud plaintiff. In addition, the jury concluded both defendants were "guilty of fraud, malice, or oppression in the conduct upon which [it] based [its] finding of liability . . . ."

When the jury returned its special verdict, the court discussed the inconsistency in the findings with counsel, and ultimately ruled AIAC "is not liable for fraud or concealment." Plaintiff argues the trial court erred by construing the jury's findings to exonerate AIAC.

The distinction between a general verdict and a special verdict is that under the former a jury "pronounce[s] generally upon all or any of the issues," while the latter is one "by which the jury find the facts only, leaving the judgment to the court." (Code Civ. Proc., § 624.) In a case "[w]here a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly." (Code Civ. Proc., § 625; see also *Tavaglione* v. *Billings* (1993) 4 Cal.4th 1150, 1156-1157; *Bond* v. *DeWitt* (1954) 126 Cal.App.2d 540, 544.)

The jury's findings that AIAC made representations recklessly but without knowing the statements were false are inherently inconsistent. A representation made recklessly without knowledge of its falsity is sufficient to establish scienter. (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 705, p. 806.) However, on both fraud theories the jury found AIAC did not act with an intent to defraud plaintiff. An intent to induce a particular act by the plaintiff is essential to establish liability for either an intentional misrepresentation or concealment of a material fact. (*Conrad* v. *Bank of America* (1996) 45 Cal.App.4th 133, 157; 5 Witkin, Summary of Cal. Law, *supra*, §§ 706 & 710, pp. 807, 810.) The absence of this element defeats plaintiff's

fraud claim against AIAC. Furthermore, the finding relevant to defendants' punitive damages liability was in the nature of a general verdict and is subordinate to the jury's specific finding of no intent to defraud. Thus, the trial court properly entered judgment for AIAC on the fraud claim.

Plaintiff contends AIAC could be found liable either as a co-conspirator of National Union or on a theory of negligent misrepresentation. These contentions are without merit.

First, since plaintiff did not assert the latter theory at trial, and the court did not instruct the jury on it, it is now too late to do so. (*Overgaard* v. *Johnson* (1977) 68 Cal.App.3d 821, 826.) Second, while the court did instruct the jury on conspiracy as a basis for imposing liability, as plaintiff concedes, the jury was not asked to return a special verdict on this allegation. Had the jury concluded AIAC was liable as a co-conspirator with National Union, it should have returned a finding of an intent to defraud.

A review of plaintiff's closing argument also reflects it relied on the representations and conduct of AIAC's employees, not conspiracy, to support its fraud claim. In fact, while discussing the question of whether National Union acted with malice, plaintiff's counsel suggested no conspiracy existed. "An insurance company whose job is to . . . investigate the situation thoroughly, concealing information which it knows is going to lead to a discovery that there's coverage – even concealing that information from its own claims people so that they won't have a guilty conscience about denying the claim – that's malice."

The trial court properly entered judgment for AIAC on the fraud claim.

The Attorney Fees Damage Award

Plaintiff retained legal counsel under an agreement requiring it to pay counsel 40 percent of all amounts recovered in the case. After a lengthy discussion, the trial court limited the attorney fees plaintiff could recover as

damages under *Brandt* v. *Superior Court*, *supra*, 37 Cal.3d 813, to 40 percent of the amount recovered as policy benefits during the trial's first phase. Plaintiff attacks this ruling and claims it should have been allowed to recover the reasonable value of counsel's services which it calculates is nearly $300,000 greater than the amount awarded by trial court. This contention lacks merit.

Brandt held attorney fees reasonably incurred to compel payment of policy benefits tortiously withheld by an insurer are recoverable as an element of damages. (*Brandt* v. *Superior Court*, *supra*, 37 Cal.3d at pp. 815, 817.) "When an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the insurer should be liable in a tort action for that expense. The attorney's fees are an economic loss – damages – proximately caused by the tort. [Citation.]" (*Id.* at p. 817.)

The retainer agreement required plaintiff to pay counsel 40 percent of all sums recovered in this action. It had no further legal obligation to pay counsel for the legal services rendered to it. *Brandt* expressly held the "fees recoverable . . . may not exceed the amount attributable to the attorney's efforts to obtain the rejected payment due on the insurance contract." (*Brandt* v. *Superior Court*, *supra*, 37 Cal.3d at p. 819.) Plaintiff cites no authority permitting a post-trial modification of the retainer agreement. Thus, the trial court did not err by limiting the attorney fee damage award to the percentage specified in the parties' contingency agreement.

The Post-Judgment Costs Award

Plaintiff attacks the trial court's post-judgment rulings concerning the award of costs on two grounds. Both arguments lack merit.

First, it disputes the court's finding AIAC was a prevailing party. Plaintiff argues that since National Union and AIAC filed a joint answer to the complaint and were represented by

the same counsel during trial, they held a unity of interest which precludes AIAC from acquiring this status.

Code of Civil Procedure section 1032 defines prevailing party to include "a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. . . . [I]n situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides . . . ." (Code Civ. Proc., § 1032, subd. (a)(4).) In conformity with this statute, the case law holds that where only one of multiple, jointly-represented defendants presenting a unified defense prevails in an action, the trial court has discretion to award or deny costs to that party. (*Webber* v. *Inland Empire Investments, Inc.* (1999) 74 Cal.App.4th 884, 920; *Slavin* v. *Fink* (1994) 25 Cal.App.4th 722, 725-726; *Smith* v. *Circle P Ranch Co.* (1978) 87 Cal.App.3d 267, 272.)

Plaintiff asserts the trial court did not exercise its discretion in this case, citing a statement by the trial judge during the hearing on the motion to strike AIAC's cost bill. However, the court made that comment in response to plaintiff's contention "no evidence" exists "to support any particular allocation" between AIAC and National Union, and that the latter entity presumably "fronted" AIAC's trial expenses. The record as a whole does not support a conclusion the trial court failed to exercise its discretion concerning AIAC's status and its recovery of costs.

The related arguments also fail. Contrary to plaintiff's assertion this is not a case where it established wrongdoing against AIAC, but simply failed to recover a monetary award. The jury found AIAC did not commit fraud. Furthermore, since the injunctive relief claim had been previously dismissed, this was an action for damages. Thus, the evidence indicating AIAC subsequently modified its

operating procedures concerning claims handling does not preclude it from being deemed a prevailing party.

Second, plaintiff contends the trial court erred by denying its recovery of expert witness fees under Code of Civil Procedure section 998. Nearly a year before trial, plaintiff served on National Union and AIAC an unsuccessful pretrial offer to compromise proposing "to allow judgment be taken . . . against defendants" for $626,489.26. In denying plaintiff's request for expert witness fees, the court cited *Taing* v. *Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579.

Code of Civil Procedure section 998, subdivision (d) authorizes the court to award a prevailing plaintiff its expert witness fees if the plaintiff made timely pretrial offer to compromise which the defendant does not accept, and "the defendant fails to obtain a more favorable judgment . . . ." In *Taing*, the court reversed an award of costs, declaring "if a plaintiff elects to submit a section 998 offer in cases involving multiple defendants, the offer to any defendant against whom the plaintiff seeks to extract penalties for nonacceptance must be sufficiently specific to permit that individual defendant to determine the exact amount plaintiff is seeking from him or her." (*Taing* v. *Johnson Scaffolding Co.*, *supra*, 9 Cal.App.4th at p. 586.) *Taing* explained its rule as follows: "[A]n unapportioned offer by a single plaintiff to multiple defendants . . . requires any defendant who wants to accept to obtain the concurrence of his or her codefendants. This places a reasonable defendant at the mercy of codefendants whose refusal to settle may be unreasonable." (*Id.* at p. 585.)

National Union and AIAC were not jointly and severally liable to plaintiff. (Cf. *Steinfeld* v. *Foote-Goldman Proctologic Medical Group, Inc.* (1996) 50 Cal.App.4th 1542, 1547-1549.) The complaint sought recovery against National Union on theories of breach of contract, bad faith, and fraud. AIAC was alleged to be liable only on the latter theory. Furthermore, the evidence relating to each defendant's liability for fraud was separate. Thus, the trial

court did not err by exercising its discretion to deny recovery of expert witness fees in this case.

NATIONAL UNION'S APPEAL

Denial of an Offset

National Union moved to have the settlement amounts plaintiff received from Ferguson and TRM offset against the damages plaintiff recovered from it. The trial court issued a lengthy written order denying the request as to both the contractual damages and the tort damages recovered by plaintiff. National Union contends the trial court erred by denying an offset in this case.

Consistent with the general rule imposing on a party the burden of proving the existence or nonexistence of each fact essential to a claim or defense (Evid. Code, § 500), "[a] defendant seeking an offset against a money judgment has the burden of proving the offset. [Citation.]" (*Conrad* v. *Ball Corp.* (1994) 24 Cal.App.4th 439, 444.)

With respect to plaintiff's contractual recovery, an insured is entitled to receive compensation in accordance with the policy terms, and an insurer cannot reduce the amount recoverable "merely because [the insured] has 'collateral contracts or relations with third persons which relieve him wholly or partly from the loss against which the insurance company agreed to indemnify him.' [Citations.]" (*Strickland* v. *Federal Ins. Co.* (1988) 200 Cal.App.3d 792, 801, quoting *Hughes* v. *Potomac Ins. Co.* (1962) 199 Cal.App.2d 239, 251, disapproved on another point in *Sabella* v. *Wisler* (1963) 59 Cal.2d 21, 34.) An insurer's right to recoup payment of policy benefits is covered by the principle of subrogation. To qualify for subrogation, the insurer must pay the insured's loss. (*Sapiano* v. *Williamsburg Nat. Ins. Co.* (1994) 28 Cal.App.4th 533, 538; *Chase* v. *National Indemnity Co.* (1954) 129 Cal.App.2d 853, 861-862.)

National Union refused to pay any policy benefits to plaintiff. The cases on which it relies to establish an offset

against the contract damages involve an insured's recovery of tort damages and whether the collateral source rule applied. Its contention the trial court "misread" *Kardly* v. *State Farm Mut. Auto. Ins. Co.* (1989) 207 Cal.App.3d 479 is incorrect. Contrary to National Union's claim, *Kardly* did not hold the insurer waives the right of subrogation by breaching the insurance contract. The part of the *Kardly* opinion National Union quotes refers to the facts of another appellate decision. (*Id.* at p. 489.) Thus, the trial court properly refused to offset the Ferguson and TRM settlements against the contractual damage award.

As for plaintiff's recovery of tort damages, the trial court agreed the collateral source doctrine did not apply because Ferguson and TRM could not be deemed collateral sources under the facts of this case. However, the court detailed the potential liability facing Ferguson and TRM, and found their potential liability exceeded $261,000 which included nonduplicative exposure exceeding $96,000. Applying the tort of another doctrine, the court concluded the settlement sums paid by Ferguson and TRM should not be offset against plaintiff's recovery from National Union.

Generally, a party cannot obtain double recovery for the same wrong where joint or concurrent tortfeasors are jointly and severally liable for the same wrong. (6 Witkin, Summary of Cal. Law, *supra*, Torts, § 1322, at p. 779.) "[I]t has long been recognized that if one tortfeasor pays partial compensation to the plaintiff, the liability of other tortfeasors will be correspondingly reduced: '. . . payments by one tortfeasor on account of a harm for which he and another are each liable, diminish the amount of the claim against the other whether or not it was so agreed at the time of payment and whether the payment was made before or after judgment. Since the plaintiff can have but one satisfaction, evidence of such payments is admissible for the purpose of reducing pro tanto the amount of the damages he may be entitled to recover.' [Citations.]" (*Krusi* v. *Bear, Stearns & Co.* (1983) 144 Cal.App.3d 664, 673.)

Where tortious acts by separate persons produce the same indivisible injury, each person is liable for the whole loss even if they did not act in concert. (*Sanchez* v. *Bay General Hospital* (1981) 116 Cal.App.3d 776, 796.) Thus, while plaintiff sued National Union for breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud, but only sought damages against Ferguson and TRM for negligence, the injury it suffered was the same.

However, the court did find the tort of another doctrine applicable to this case. "A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred. [Citations.]" (*Prentice* v. *North Amer. Title Guar. Corp.* (1963) 59 Cal.2d 618, 620.)

Generally, a party seeking to recover litigation costs under this rule must plead and prove the claim. (*Hsu* v. *Abbara* (1995) 9 Cal.4th 863, 869, fn. 4.) While plaintiff did not do so here, the potential for its recovery of damages from Ferguson and TRM was made known to them during pretrial discovery. Furthermore, had it not settled with Ferguson and TRM, plaintiff could have amended the complaint to assert its right to recover the fees and expenses incurred in its action against National Union.

The record reflects National Union failed to establish the trial court erred by denying its request for an offset.

PUNITIVE DAMAGES

Introduction

Both parties attack the punitive damage award. National Union challenges the sufficiency of the evidence supporting the recovery of exemplary damages, the court's refusal to instruct the jury National Union could only be subject to punitive damages based on its own employees' conduct, and

the constitutionality of the award imposed on it. Plaintiff contends the trial court erred by reducing the punitive damage award to $1.7 million.

Sufficiency of the Evidence

National Union claims its own conduct was not oppressive, fraudulent, or malicious, TRM's activity cannot be attributed to it, and it did not ratify TRM's actions.

Civil Code section 3294 authorizes the award of punitive damages in any "action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice . . . ." (Civ. Code, § 3294, subd. (a).) In *Egan* v. *Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, the Supreme Court upheld an award of punitive damages against an insurer based on evidence two employees, a claims manager and a claims adjuster, failed to adequately investigate the insured's claims under a disability insurance policy. "The determination whether employees act in a managerial capacity, however, does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy. When employees dispose of insureds' claims with little if any supervision, they possess sufficient discretion for the law to impute their actions concerning those claims to the corporation." (*Id.* at pp. 822-823.)

Subsequently, the Legislature amended Civil Code section 3294 to provide, "[a]n employer shall not be liable for [punitive] damages . . . based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization,

ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (Civ. Code, § 3294, subd. (b).)

In *White* v. *Ultramar, Inc.* (1999) 21 Cal.4th 563, the Supreme Court considered the effect of this amendment in an action for wrongful termination. The plaintiff, a convenience store employee, had been fired by a manager who was responsible for eight stores, covering sixty-five employees. The jury awarded plaintiff both compensatory and punitive damages.

In affirming, the Supreme Court concluded that "in amending section 3294, the Legislature intended (like *Egan*, *supra*, 24 Cal.3d at p. 823) to limit corporate punitive damage liability to those employees who exercise substantial independent authority and judgment over decisions that ultimately determine corporate policy." (*White* v. *Ultramar, Inc.*, *supra*, 21 Cal.4th at p. 573.) The court noted "section 3294, subdivision (b), placed ['managing agent'] next to the terms 'officer' and 'director,' intending that a managing agent be more than a mere supervisory employee. The managing agent must be someone who exercises substantial discretionary authority over decisions that ultimately determine corporate policy. Thus, by selecting the term 'managing agent,' and placing it in the same category as 'officer' and 'director,' the Legislature intended to limit the class of employees whose exercise of discretion could result in a corporate employer's liability for punitive damages." (*Ibid.*) The critical factor " ' ". . . is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy." [Citation.]' " (*Id.* at p. 573.)

The agency agreement between National Union and TRM and the evidence in this case shows TRM had broad discretion over National Union's bus insurance program. TRM could "solicit, bind, write and administer insurance" policies, and "exercise [its] independent judgment as to the time, place and manner of soliciting insurance and servicing

policyholders." There was evidence AIAC directed its employees to contact TRM when seeking coverage verification. In this case, TRM participated in issuing the policy to Ko, in subsequently canceling it, and then reinstating a modified version of it. Later, when Ko submitted a claim on the bus, TRM initially issued a coverage determination, but then prepared an endorsement deleting the vehicle from the policy, and advised AIAC to deny the claim. Furthermore, TRM's president was in contact with both AIAC and the senior management of the division handling National Union's bus program when plaintiff's claim was being considered, and participated in the ultimate decision to deny it. This evidence supports the jury's conclusion TRM was National Union's managing agent, thereby subjecting it to punitive damages under Civil Code section 3294. (*White* v. *Ultramar, Inc.*, *supra*, 21 Cal.4th at p. 577; *Egan* v. *Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d at p. 823.)

In light of this conclusion it is unnecessary to consider National Union's additional claims concerning instructional error and the insufficiency of the evidence based on its own conduct.

Validity of the Trial Court's Remittitur

The trial court issued a post-judgment order conditionally granting National Union a new trial on the insurance bad faith and fraud counts, and plaintiff's right to receive punitive damages unless the latter agreed to reduce the punitive damage award to $1.7 million. Plaintiff timely consented to the remittitur. After National Union filed its appeal, plaintiff cross-appealed and now challenges the remittitur's validity.

A trial court has the discretion to conditionally grant a new trial unless the plaintiff consents to a reduction of a damages award where the court independently determines the jury's award is excessive. (Code Civ. Proc., § 662.5, subd. (b); *Schelbauer* v. *Butler Manufacturing Co.* (1984) 35 Cal.3d 442, 452-453; *West* v. *Johnson & Johnson Products, Inc.*

(1985) 174 Cal.App.3d 831, 876.) Reversal of the ruling is allowed only where there is no substantial basis in the record to support the reasons articulated by the trial court for its decision. (Code Civ. Proc., § 657; *Jahn* v. *Brickey* (1985) 168 Cal.App.3d 399, 408.)

The court noted the ratio of the original punitive damage award to compensatory damages (60 to 1) created a presumption the jury's verdict was the result of passion and prejudice. (*Rosener* v. *Sears, Roebuck & Co.* (1980) 110 Cal.App.3d 740, 752.) Plaintiff focuses much its argument on the reprehensible nature of National Union's conduct. While the court agreed the evidence supported the jury's conclusion National Union had acted reprehensibly, it concluded the jury had placed too much emphasis on National Union's financial wealth and failed to adequately consider the relationship between the injury suffered by plaintiff and the amount of the punitive damage award. The court noted this lawsuit involves an action by one corporate entity against another corporate entity to recover only for economic loss, the value of plaintiff's security interest in a damaged bus. Given these circumstances, the trial court noted upholding the original award raised serious constitutional concerns.

Plaintiff also challenges the portion of the remittitur order requiring it to choose between a reduction in punitive damages and a new trial on *both* liability and the amount of punitive damages. In so ruling, the trial court cited *Medo* v. *Superior Court* (1988) 205 Cal.App.3d 64. Plaintiff relies on *Torres* v. *Automobile Club of So. California* (1997) 15 Cal.4th 771 in challenging the trial court's ruling.

Torres held Civil Code section 3295, subdivision (d) did not require an *appellate* court which reverses an excessive punitive damage award to order a new trial on all issues, including liability and the amount of compensatory damages. (*Id.* at pp. 777-781.) In so ruling, *Torres* distinguished *Medo*. (*Id.* at p. 780.) In *Medo*, the *trial* court ordered a new trial on all issues when the jury was discharged after

completion of the liability phase. While agreeing with the plaintiffs' assertion that the defendants had waived their right to have the same jury determine both liability and the right to punitive damages, the appellate court nonetheless noted, "[p]unitive damages are not simply recoverable in the abstract. They must be tied to oppression, fraud or malice *in the conduct which gave rise to liability in the case.* Thus . . ., the instruction on punitive damages[] tells the jury that in arriving at an award of punitive damages, it is to consider the reprehensibility of the conduct of the defendant and that the punitive damages must bear a reasonable relation to the actual damages. In order for a jury to evaluate the oppression, fraud or malice in the conduct giving rise to liability in the case, it must consider the conduct giving rise to liability." (*Medo* v. *Superior Court*, *supra*, 205 Cal.App.3d at p. 68.)

However, even assuming the trial court erred by relying on *Medo* to order a new trial on all issues if plaintiff refused to accept a reduction in the punitive damage award, the ruling does not require reversal. As the trial judge concluded, the jury's $10 million punitive damage award was clearly constitutionally suspect. Thus, ordering a remittitur in this case was appropriate under the circumstances.

Constitutionality of the Award

Finally, National Union contends that even the $1.7 million punitive damage award is excessive and unconstitutional. This argument lacks merit.

Punitive damages have two purposes; punish the wrongdoer and deter similar misconduct in the future by making an example of the wrongdoer. (*PPG Industries, Inc.* v. *Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 317; *Stevens* v. *Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1658.) "The essential question for the jury, the trial court, and the appellate courts is whether the amount of the award substantially serves the public interest in punishment and deterrence. The California Supreme

Court has established three criteria for making that determination: (1) the reprehensibility of the defendant's misdeeds; (2) the amount of compensatory damages, though there is no fixed ratio for determining whether punitive damages are reasonable in relation to actual damages; and (3) the defendant's financial condition. [Citations.]" (*Stevens* v. *Owens-Corning Fiberglas Corp.*, *supra*, 49 Cal.App.4th at p. 1658.) On appeal, a judgment awarding punitive damages is presumed to be correct and will be reversed only if the record, viewed most favorably to the judgment, reflects the award is the result of passion or prejudice. (*Ibid.*)

The United Supreme Court has recognized that an excessive punitive damage award may also violate a person's constitutional right to due process of law. (*BMW of North America, Inc.* v. *Gore* (1996) 517 U.S. 559, 562; *TXO Production Corp.* v. *Alliance Resources Corp.* (1993) 509 U.S. 443, 454.) In *BMW*, the court noted: "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." (*BMW of North America, Inc.* v. *Gore*, *supra*, 509 U.S. at p. 574, fn. omitted.) The court identified "[t]hree guideposts" to consider in analyzing the constitutionality of a punitive damage award: "[T]he degree of reprehensibility [of the wrongdoer's conduct]; the disparity between the harm or potential harm suffered . . . and [the] punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." (*Id.* at pp. 574-575.)

The record reflects the present award is permissible under both state and federal law. While it is true the loss involved only economic injury, the evidence reflects National Union engaged in reprehensible conduct. To enforce the purposes of punishing the wrongdoer and deterring similar future wrongful conduct, the award necessarily had to be large to affect a corporate entity such as National Union. "The wealthier the wrongdoer, the larger the punitive damage

award must be to meet the goals of punishment and deterrence. [Citations.]" (*Stevens* v. *Owens-Corning Fiberglas Corp.*, *supra*, 49 Cal.App.4th at p. 1658.)

National Union does not dispute the fact reprehensible conduct occurred in this case. It only argues TRM, not it, committed the wrongdoing. But Civil Code section 3294, subdivision (b) permits the imposition of punitive damages on a person held vicariously liable for another's actions. National Union also focuses on the ratio between the punitive damage award and the compensatory damage award. While punitive damages must bear a reasonable relation to the actual damages suffered by the plaintiff, no fixed ratio exists to determine the proper proportion between them. (*Finney* v. *Lockhart* (1950) 35 Cal.2d 161, 164; *Zhadan* v. *Downtown L. A. Motors* (1976) 66 Cal.App.3d 481, 498.)

Thus, we conclude the award of $1.7 million in punitive damages in this case is not excessive, nor does it violate National Union's constitutional right to due process of law.

DISPOSITION

The judgment and post judgment orders are affirmed. The motion to augment the record on appeal is granted. Each party shall bear its own costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.

APPENDIX B

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

Case No. 734096

TEXTRON FINANCIAL CORPORATION, A DELAWARE CORPORATION,

Plaintiff,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA; AND AMERICAN INTERNATIONAL ADJUSTMENT COMPANY, INC.,

Defendant.

Assigned for All Purposes to:
Judge Raymond J. Ikola
Dept. 8

Filed: May 29, 1996
Trial Date: February 26, 1996

JUDGMENT

This action came on regularly for trial by jury, beginning on February 26, 1996, in Department 8 of the above-entitled Court, Honorable Raymond J. Ikola, presiding. Plaintiff Textron Financial Corporation ("Textron") appeared by its attorneys, Steven H. Gentry and David B. Ezra of Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, and defendants National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") and American International Adjustment Company ("AIAC") appeared by their attorneys, R. Gaylord Smith and Michael Connally of Lewis, D'Amato, Brisbois & Bisgaard.

During the trial, the Court ruled that there was coverage for Textron's claim, as a matter of law. The Court concluded that the actions of the first named insured, Il Sung Ko, could not have terminated Textron's protection under the applicable policy.

During the trial, the Court granted National Union's motion for nonsuit, but only to the extent that Textron's complaint included allegations of a conspiracy to commit insurance bad faith. In all other respects, National Union's motions for nonsuit, and its motions for directed verdicts, were denied.

A jury of twelve persons was duly impaneled and sworn; witnesses testified; and after being duly instructed by the Court, the jury deliberated and thereon duly returned the following special verdict in Phase I:

"We, the jury, find and report to the court our special verdict in phase 1 of the trial in this matter as follows:

1. What is the amount of money payable to Textron under the policy? $61,513.80 .

2. Did Textron fail to mitigate its damages?

Yes _____ No __x__

3. If your answer to the previous question was yes, state the amount of damages caused by Textron's failure to mitigate: _____.

Dated: March 14, 1996 /s/
Foreperson
Jon A. Ribble"

Thereafter, the Court ruled that Textron's attorney fee damages could not exceed the law firm's contingent percentage (40%) of the amounts unreasonably withheld by National Union (together with interest).

Based on the Court's ruling, evidence of time incurred by Textron's attorneys in an effort to compel payment of policy benefits was not presented to the jury. Textron and National Union stipulated, based on the ruling of the Court, that Textron's attorney fee recovery would be 40% of $61,513.80 (plus interest from January 25, 1994), together with expenses in the amount of $55,616.34.

After being duly instructed by the Court, the jury deliberated and thereon duly returned the following special verdict in Phase II:

"We, the jury in the above entitled case, find the following on the questions submitted to us:

1. Do you find by a preponderance of the evidence that Nation[al] Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") violated the implied covenant of good faith and fair dealing owing to Textron?

Yes x No _____

If you answer "No" to Question No. 1, then go to Question No. 5. If you answer "Yes", then answer Questions Nos. 2, 3, and 4.

2. Do you find by clear and convincing evidence that National Union was guilty of oppression in the conduct upon

which you based your finding of liability for breach of the implied covenant of good faith and fair dealing?

Yes __x__ No _____

3. Do you find by clear and convincing evidence that National Union was guilty of malice in the conduct upon which you based your finding of liability for breach of the implied covenant of good faith and fair dealing?

Yes __x__ No _____

4. Do you find by clear and convincing evidence that National Union was guilty of fraud in the conduct upon which you based your finding of liability for breach of the implied covenant of good faith and fair dealing?

Yes __x__ No _____

5. Did either defendant make a representation as to a past or existing material fact?

National Union: Yes __x__ No _____

AIAC: Yes __x__ No _____

If you answer Question No. 5 "No" as to both defendants, go to Question No. 15. If you answer Question No. 5 "Yes" as to either defendant, then answer the next question.

6. Was the representation false?

National Union: Yes __x__ No _____

AIAC: Yes __x__ No _____

If you answer Question No. 6 "No" as to both defendants, got [sic] to Question No. 15. If you answer Question No. 6 "Yes" as to either defendant, then answer questions 7a and 7b.

7a. Did either defendant know that the representation was false when it was made?

National Union: Yes __x__ No _____

AIAC: Yes _____ No __x__

7b. Did either defendant make the representation recklessly without knowing whether it was true or false?

National Union: Yes __x__ No _____

AIAC: Yes __x__ No _____

If you answer both Questions 7a and 7b "No" as to both defendants, go to Question No. 15. If you answer Question No. 7A or 7b "Yes" as to either defendant, then answer the next question.

8. Did either defendants make the representation with an intent to defraud the plaintiff?

National Union: Yes __x__ No _____

AIAC: Yes _____ No __x__

If you answer Question No. 8 "No" as to both defendants, go to Question No. 15. If you answer Question No. 8 "Yes" as to either defendant, then answer the next question.

9. Was the plaintiff aware of the falsity of the representation?

Yes _____ No __x__

If you answer Question No. 9 "Yes", go to Question No. 15. If you answer Question No. 9 "No", then answer the next question.

10. Did the plaintiff act in reliance upon the truth of the representation?

Yes __x__ No _____

If you answer Question No. 10 "No", go to Question No. 15. If you answer Question No. 10 "Yes", then answer the next question.

11. Was the plaintiff justified in relying upon the representation?

Yes __x__ No _____

If you answer Question No. 11 "No", go to Question No. 15. If you answer Question No. 11 "Yes", then answer the next question.

12. Did either defendant's misrepresentation cause plaintiff damage?

National Union: Yes __x__ No _____

AIAC: Yes __x__ No _____

If you answer Question No. 12 "No" as to both defendants, go to Question No. 15. If you answer Question No. 12 "Yes" as to either defendant, then answer the next question.

13. What is the total amount of all damage suffered by the plaintiff and caused by the reliance upon the truth of the representation?

Answer: $3859.50

If you answer Question No. 13 "No Damage", then go to Question No. 15. If you filled in a dollar amount in answer to Question No. 13, then answer the next question.

14. Do you find by clear and convincing evidence that either defendant was guilty of fraud, malice, or oppression in the conduct upon which you based your finding of liability for fraud?

National Union: Yes __x__ No _____

AIAC: Yes __x__ No _____

15. Did either defendant conceal or suppress a material fact?

National Union: Yes __x__ No _____

AIAC: Yes __x__ No _____

If you answer Question No. 15 "No" as to both defendants, then sign and return the verdict. If you answer Question No. 15 "Yes" as to either defendant, then answer the next question.

16. Did either defendant intentionally conceal or suppress the material fact with the intent to defraud the plaintiff?

National Union: Yes __x__ No _____

AIAC: Yes _____ No __x__

If you answer Question No. 16 "No" as to both defendants, then sign and return the verdict. If you answer Question No. 16 "Yes" as to either defendant, then answer the next question.

17. Was the plaintiff aware of the material fact at the time plaintiff acted?

Yes _____ No __x__

If you answer Question No. 17 "Yes", then sign and return the verdict. If you answer Question No. 17 "No", then answer the next question.

18. Would the plaintiff had acted in the way it did if it had known of the concealed or suppressed material fact?

Yes _____ No __x__

If you answer Question No. 18 "Yes", then sign and return the verdict. If you answer Question No. 18 "No", then answer the next question.

19. Did either defendant's concealment or suppression of the material fact cause plaintiff damage?

National Union: Yes __x__ No _____

AIAC: Yes __x__ No _____

If you answer Question No. 19 "No" as to both defendants, then sign and return the verdict. If you answer Question No. 19 "Yes", as to either defendant, then answer the next question.

20. What is the total amount of all damage suffered by the plaintiff and caused by the concealment or suppression of the material fact?

Answer: $3859.50

If you answer Question No. 20 "No Damage", then sign and return the verdict. If you filled in a dollar amount in answer to Question No. 20, then answer the next question.

21. Do you find by clear and convincing evidence that either defendant was guilty of fraud, malice, or oppression in the conduct upon which you based your finding of liability for the intentional concealment or suppression of a material fact?

National Union: Yes __x__ No _____

AIAC: Yes __x__ No _____

Please sign and date this verdict form.

Dated: April 11, 1996

Jon A. Ribble
/s/
Foreperson"

Based upon this verdict, the Court determined that AIAC was entitled to judgment in its favor.

After being duly instructed by the Court, the jury deliberated and thereon duly returned the following special verdict in Phase III:

"We, the jury in the above entitled action, find the following special verdict on the questions submitted to us:

1. Shall punitive damages be assessed against defendant National Union Fire Insurance Company of Pittsburgh, Pennsylvania?

Yes __x__ No _____

If your answer is "yes," please answer the next question. If your answer is "no," have your foreperson sign and date this special verdict.

2. We assess punitive damages against National Union Fire Insurance Company of Pittsburgh, Pennsylvania, as follows:

$10,000,000.00.

Please sign and date this verdict form.

Dated: April 12, 1996

Jon A. Ribble
/s/
Foreperson"

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED as follows:

Plaintiff Textron Financial Corporation shall have and recover judgment against defendant National Union Fire Insurance Company of Pittsburgh, Pennsylvania:

1. For general and compensatory damages, $165,414.40 (representing $61,513.80 in unpaid policy benefits, $14,156.60 in interest on unpaid benefits from January 24, 1994 to May 14, 1996, $85,884.50 pursuant to *Brandt* v. *Superior Court*, and $3,859.50 in additional damages on the fraud cause of action);

2. For punitive damages, ten million dollars ($10,000,000.00);

3. Plus costs and disbursements in the amount of $39,280.31* . *(Per Order of 7-29-96)

Defendant American International Adjustment Company shall have judgment against plaintiff Textron Financial Corporation and shall recover costs and disbursements in the amount of $10,277.52 . (Per M.O. of 10-3-96)

DATED: 5/29/96 By: /s/ Raymond J. Ikola
RAYMOND J. IKOLA,
Judge of the Superior Court

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE

Case No. 73 40 96

TEXTRON FINANCIAL CORPORATION, A DELAWARE CORPORATION,

Plaintiff,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, ET AL.,

Defendants.

Filed: July 29, 1996

RULING AND ORDER CONDITIONALLY GRANTING NATIONAL UNION'S MOTION FOR NEW TRIAL

The court, having read and considered the Motion for New Trial filed herein by defendant National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union"), together with the papers filed in opposition to the motion by plaintiff Textron Financial Corporation ("Textron") and the papers filed in reply to the opposition by National Union, and having heard and considered the arguments made by both

parties at the hearing on the motion on July 25, 1996, now rules as follows:

National Union's Motion for New Trial is granted as to the causes of action for fraud and for breach of the implied covenant of good faith and fair dealing and the award of punitive damages on the ground that the award of punitive damages is excessive. The new trial will be as to National Union only. Provided, however, that the order granting a new trial is denied if Textron consents to a reduction of the $10 million award of punitive damages in the amount of $8.3 million to a total award of punitive damages in the amount of $1.7 million ($1,700,000.00). The court, in its independent judgment, has determined from the evidence that a punitive damage award of $1.7 million is fair and reasonable.

The reasons the court has conditionally granted the motion for new trial on the ground of excessive damages are as follows.

The jury was instructed, in connection with making its determination of whether to award punitive damages, to consider: (i) the reprehensibility of the conduct of the defendant; (ii) the amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition; and (iii) that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff." BAJI 14.72.2. The court has concluded that the jury gave undue emphasis to the second factor, i.e., the amount of damages which will have a deterrent effect in light of the defendant's financial condition, and insufficient emphasis to the third factor, i.e., the relationship between the damage suffered and the amount of the award. The punitive damages awarded by the jury amounted to slightly more 60 times the total compensatory award. In *Rosener* v. *Sears, Roebuck & Co.*, 110 Cal.App.3d 740, 752 (1980), the court referred to an award in which the ratio of punitive to compensatory damages was approximately 63 to 1, with a difference in the awards of $9.85 million, as "grossly disproportionate," raising "a

presumption that it was the result of passion or prejudice." *Id.* at 752. In the case at bar the ratio of punitive to compensatory damages is 60 to 1, and the difference is $9.83 million. The same presumption of passion or prejudice is as apparent in this case as it was in *Rosener*. The amount awarded by the jury greatly exceeds that which is necessary to deter future conduct of the type shown by the evidence in this case.

Further, the court is obliged to examine the award in light of the federal due process "guideposts" outlined by the U.S. Supreme Court in *BMW of North America* v. *Gore*, 96 D.A.R. 5747 (May 20, 1996), a decision announced after the jury reached its verdict. The first guidepost, described by the *BMW* court as "perhaps the most important indicium of the reasonableness of a punitive damages award" is "the degree of reprehensibility of the defendant's conduct." This guidepost matches one of the factors given to the jury to consider in this case consistent with *Neal* v. *Farmers Ins. Exchange*, 21 Cal.3d 910, 928 (1978). Although the court finds that the jury had sufficient evidence to find that National Union's conduct was sufficiently reprehensible to merit the imposition of punitive damages, the court also notes, as did the Supreme Court in *BMW*, that the harm inflicted was purely economic in nature. Nothing done by the defendant showed any "indifference to or reckless disregard for the health or safety of others." *BMW* at 5750. This factor has also been used by California courts in the process of assessing the reprehensibility of the defendant's conduct when reviewing a punitive damage award. For example, the court in *Seeley* v. *Seymour*, 190 Cal.App.3d 844, 867 (1987) observed that the parties in that case were sophisticated businessmen of relatively equal bargaining strength, and thus the situation carried "a lesser degree of 'reprehensibility'" than the more typical punitive damage case where a large or sophisticated business enterprise uses its wealth or power to exploit the weak or the unwary. *Id.* The court concludes that in this case as well, the parties were

both large business enterprises, neither of which was able to exploit the other.

The second *BMW* guidepost is the ratio of the punitive damages to the actual harm. This factor has been addressed above under California law. The U.S. Supreme Court has stated that it is impossible to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." The Court reiterated, however, that a "general concern of reasonableness properly enters into the constitutional calculus." As noted above, this court concludes that a ratio of 60 to 1 raises a presumption of jury passion or prejudice. Consistent with a "general concern of reasonableness," the court also concludes that permitting this award to stand would make it constitutionally suspect.

The third *BMW* guidepost is a consideration of sanctions adopted by the legislature for comparable misconduct. National Union points to Insurance Code 790.035(a) which imposes a penalty of up to $10,000 for each act in violation of section 790.03. While this court has concluded that the punitive damage award is excessive for the other reasons stated above, the utilization of section 790.035(a) as a guidepost is of significantly less importance. It is noted that the "guideposts" reviewed by the Supreme Court were all for the purpose of assisting the Court in determining whether the defendant received "fair notice not only of the conduct that will subject [it] to punishment but also of the severity of the penalty that a State may impose." *BMW* at 5750. Despite the civil penalties provided by Section 790.035, California has a long history of permitting punitive damage awards where the evidence is sufficient to establish fraud or the malicious or oppressive breach of the covenant of good faith and fair dealing. Surely National Union does not contend, nor can it, that it did not have fair notice that the breach of the covenant of good faith and fair dealing could result in the imposition of substantial punitive damages under the common law. It is also significant to observe in this connection that despite the long history of these awards under the common law, the

California legislature has not acted to impose any statutory limitation on such awards as it has, for example, with respect to negligence actions against health providers.

Accordingly, as noted at the outset, the court concludes that the punitive damage award in this case is excessive. Because the same jury must determine both punitive damages and liability, *Medo* v. *Superior Court*, 205 Cal.App.3d 64, 66-68 (1988), a new trial is ordered on the causes of action for fraud, breach of the covenant of good faith and fair dealing, and on the award of punitive damages. The new trial will be as to National Union only. The court has determined from the evidence, however, that an award of $1.7 million for punitive damages would be fair and reasonable. Therefore, if plaintiff files its written consent to reduce the award of punitive damages to the amount of $1.7 million, the motion for new trial will be denied. CCP 662.5. Plaintiff's written consent to the remittitur, should it choose to do so, is to be filed and served within 15 days of the date of this order.

Clerk to give notice to the parties

DATED: July 29, 1996

/s/ Raymond J. Ikola
RAYMOND J. IKOLA,
Judge of the Superior Court

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

Case No. 734096

TEXTRON FINANCIAL CORPORATION, A DELAWARE CORPORATION,

Plaintiff,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA; AND AMERICAN INTERNATIONAL ADJUSTMENT COMPANY, INC.,

Defendant.

Assigned for All Purposes to:
Judge Raymond J. Ikola
Dept. 8

Filed: August 12, 1996

TEXTRON'S WRITTEN CONSENT
TO REMITTITUR OF PUNITIVE DAMAGES

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Textron Financial Corporation ("Textron") consents to the remittitur of punitive damages from $10 million to $1.7 million, in accordance with the Court's ruling and order conditionally granting National Union's motion for a new trial (which was filed on July 29, 1996).

DATED: August 12, 1996

BERGER, KAHN, SHAFTON, MOSS,
FIGLER, SIMON & GLADSTONE
A Professional Corporation

By: /s/ David B. Ezra
DAVID B. EZRA,
Attorneys for Plaintiff TEXTRON
FINANCIAL CORPORATION

APPENDIX E

COURT OF APPEAL, FIRST APPELLATE DISTRICT,
DIVISION FOUR - NO. G020323

IN THE SUPREME COURT OF CALIFORNIA

En Banc

S095924

TEXTRON FINANCIAL CORPORATION,
Plaintiff and Appellant,

v.

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PENNSYLVANIA ET AL.,
Defendants and Appellants.

Filed: May 2, 2001

Petition for review DENIED.

GEORGE
Chief Justice

APPENDIX F

COURT OF APPEAL, FOURTH APPELLATE DISTRICT,
DIVISION THREE - NO. G020323

IN THE SUPREME COURT OF CALIFORNIA

En Banc

S095924

TEXTRON FINANCIAL CORPORATION,
Plaintiff and Appellant,

v.

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PENNSYLVANIA ET AL.,
Defendants and Appellants.

Filed: May 4, 2001

The order filed on May 2, 2001, is hereby modified to reflect the above-captioned corrected district and division.

/s/ George
Chief Justice